Supreme Court, U.S.
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No. OFFICE OF THE CLERK

IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

PAUL ELIE and EDGAR C. ELIE,
Petitioners,

v.

MARVIN BROXMEYER,
Respondent.

Petition for a Writ of Certiorari to the Supreme Court of the State of Florida

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PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

The Questions Presented for Review are stated here in their reverse Order so that the order of importance is more readily ascertainable to the Court.

1. May a party who noticed appeal from a state trial court's judgment, and thereafter filed a voluntary Chapter 7 Bankruptcy, pursue that appeal without specific authorization to do so from the Bankruptcy Court, without the posting of a bond on behalf of the Estate, and without substituting the Trustee and Chapter 7 Bankruptcy Estate, over objection of Appellee?

2. Does Article V, Section 3(b)(3) Of the Florida Constitution, as applied, violate the Fourteenth Amendment's guarantee of Equal Protection and Due Process, where a party who loses at trial may notice an appeal as a matter of right pursuant to State law, in an intermediate level appellate court, and can prevail, but that the losing party on appeal, if the prevailing party at trial, has no direct right of review of any errors committed by the appellate court in reaching its decision?

STATEMENT PURSUANT TO RULES 14.1(b) AND 29.1

All revelant parties to this Petition are named in the caption; however, the proceedings below involved the Petitioner, Respondent (1 & 2 below) and several other parties. Suit has been settled with all parties below except the Respondent.

1. Paul Elie and Edgar C. Elie, Petitioners
2. Marvin Broxmeyer, Respondent
3. Judith Broxmeyer
4. Royal Rehab Corp., a Florida Corporation
5. Cantor Samuel, Inc., a Florida Corporation
6. Levlex Enterprises, Ltd., a New York Corporation
7. Restoration Resources, Inc., a Florida Corporation
8. Dobrick, Inc., a Florida Corporation
9. Marcia T. Dunn, Esquire, Chapter 7 Trustee
10. James M. Feltman, Chapter 7 Trustee
11. Raymond H. Alfonso

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PETITION FOR A WRIT OF CERTIORARI

INTRODUCTORY PRAYER

Appellants PAUL ELIE and EDGAR C. ELIE pray this Court to grant their petition for certiorari to review an adverse decision by the Supreme Court of the State of Florida, sub nom. Fourth District Court of Appeal, State of Florida.

CITATIONS TO OPINIONS BELOW

The decision of the Florida Supreme Court is not reported. (*see* Appendix 1a).

The decision of the Fourth District Court of Appeal, State of Florida, is reported at 647 So.2d 893 (Fla. 4th DCA 1995) (*see* Appendix 2a through 4).

JURISDICTION

This Court has jurisdiction under 28 U.S.C. § 1257(a) because the appellants seek review of an adverse decision rendered final and reviewable here by the Supreme Court of the State of Florida, and involves an important Federal question regarding Bankruptcy law.

STATUTORY PROVISIONS INVOLVED

The primary statutory provisions involved herein are:

I. 11 U.S.C. § 541. Property of the [bankruptcy] estate.

(a) The commencement of a case under section 301, 302, or 303 of this title creates an estate. Such estate is comprised of all of the following property, wherever located and by whomever held:

(1) Except as provided in subsections (b) and (c)(2) of this section, all legal or equitable interests of the debtor in property as of the commencement of the case. . . . (*et seq.*).

II. 11 U.S.C. § 362. Automatic stay [bankruptcy estate].

(a) Except as provided in subsection (b) of this section, a petition filed under section 301, 302, or 303 of this title, or an application filed under section 5(a)(3) of the Securiteis Investor Protection Act of 1970 (15 U.S.C. 78eee(a)(3)), operates as a stay, applicable to all entities, of— . . . . (*et seq.*).

CONSTITUTIONAL PROVISIONS INVOLVED

I. Article V, Section 3(b)(3) of the Florida Constitution.

(b) JURISDICTION.—The supreme court:

(3) May review any decision of a district court of appeal that expressly declares valid a state statute, or that expressly construes a provision of the state or federal constitution, or that ex-

pressly affects a class of constitutional or state officers, or that expressly and directly conflicts with a decision of another district court of appeal or of the supreme court on the same question of law.

STATEMENT OF THE CASE

A. Preliminary Jurisdictional Facts

On June 8, 1995 the Supreme Court of Florida declined to review the Opinion of the District Court of Appeal, Fourth District of Florida (hereinafter District Court of Appeal, one of Florida's intermediate level appellate courts). The basis was Article V, Section 3(b)(3) of the Florida Constitution. Appendix A-1. *Elie v. Broxmeyer*, Supreme Court of Florida, Case No. 85,072 (Fla., June 8, 1995). The Opinion of the District Court of Appeal is found at *Broxmeyer v. Elie*, 647 So.2d 893 (Fla. 4th DCA 1994). App. 2a-5a.

The judgment of the District Court of Appeal follows a Verdict and Judgment entered on August 20, 1992 and August 26, 1992 respectively. App. 6a-12a.

The Petitioners filed a Motion for Rehearing as to the Opinion of the District Court of Appeal, on December 1, 1994. App. 13a-34a. Rehearing was denied December 28, 1994. App. 35a. Thereafter a Notice to Invoke Jurisdiction in the Supreme Court of Florida was filed on January 24, 1995. App. 36a-42a. The Supreme Court of Florida declined to review the Appellate Court Opinion based upon Article V, Section 3(b)(3) of the Florida Constitution, which does not provide for review of errors in the District Courts of Appeal unless the opinion *expressly and directly* conflicts with the opinions of other District Courts of Appeal or the Florida Supreme Court on the same points of law. Appendix 1a.

The Supreme Court of Florida is the highest court of competent jurisdiction in the State of Florida. However,

the Florida Supreme Court can only exercise, except in a few cases, limited discretionary review. As a result, the *prevailing* party at trial, who loses on appeal, has no direct right to review errors by the appellate court, while the *losing* party at trial has an absolute right of appellate review.

B. Undisputed Facts Forming the Statement of the Case

In the years 1986 through 1988, Respondent Marvin Broxmeyer associated with one Raymond H. Alfonso (Alfonso), a judgment debtor of the Petitioners. During Respondent's association with Alfonso, Respondent assisted Alfonso in hiding Alfonso's assets from Petitioners, Alfonso's creditors. In 1988 Alfonso filed a voluntary Chapter 7 Bankruptcy case in the Southern District of Florida and Alfonso was denied discharge pursuant to 11 U.S.C. § 727(a)(4) (false oath or affirmation in or in connection with a bankruptcy case). *In re: Alfonso,* 94 B.R. 777 (Bankr. S.D. Fla. 1988). The denial of discharge followed suit by Alfonso's bankruptcy trustee's discovery that Alfonso had concealed his assets and his interests in various business ventures that included Respondent.

In December, 1990, Petitioners filed suit against Respondent and others (who are not parties to this petition) for civil conspiracy to conceal the assets of Alfonso as Petitioners' judgment debtor and in the alternative for an accounting of Alfonso's assets (following a turnover proceeding in the case below).

The case went to trial, the accounting pending the determination of whether or not Petitioners were entitled to money damages in the alternative. Thereafter a verdict was returned in Petitioners' favor (App. 6a-8a) and a money judgment was entered aaginst Respondent (App. 9a-12a).

After the money judgment was entered against Respondent, he among the other then-defendants, filed a Notice of Appeal invoking the mandatory jurisdiction of

the District Court of Appeal, Fourth District of Florida ("District Court of Appeal") on October 10, 1992. App. 71a-76a.

After filing a Notice of Appeal, Respondent, filed a voluntary bankruptcy under Chapter 7 of Title 11 of the United States Bankruptcy Code on April 1, 1993. Up until this time no brief had been filed in behalf of Respondent. Thereafter, Petitioners filed motions in the District Court of Appeal to stay appellate proceedings or dismiss the pending appeal on various bases all connected with the bankruptcy filings. App. 43a-68a. The Appellate Court refused each motion and moved forward with the Appellate proceedings over Petitioners' objection and upon pain of sanctions. App. 69a-70a.

Marvin Broxmeyer's Estate was never authorized by the Trustee or the Bankruptcy Court to move forward on the appeal and there is no record evidence of that authorization.

In no event did the Respondents' bankruptcy trustee participate in the appellate proceeding.

No order of the Bankruptcy Court expressly authorized the Respondent to represent the Bankruptcy Estates or the Trustee. Furthermore, the prosecution of the appeals was done without the posting of any bond by Respondent.

Over the repeated objections by Petitioners to the District Court of Appeal's jurisdiction, it rendered its opinion. App. 2a-5a.

After reversal on appeal, Petitioners contended that the Appellate Court had substituted its view of the evidence for that of the trial judge and jury, despite their objections to the continued prosecution of the appeal below due to the Bankruptcy filings. Consequently, there are two distinctly Federal issues raised: 1) Does Florida's appellate scheme, as mandated by the Florida State Constitution, deprive prevailing parties at trial of equal protection or due process rights under the Federal Constitution, and;

2) Did the Respondents herein, and the Florida intermediate appellate court, violate the strictures of Federal Bankruptcy law by continuing to prosecute and determine the State Court appeals without the consent or participation of the Federal Bankruptcy Court or the Bankruptcy Trustee?

This proceeding is brought pursuant to Article III of the United States Constitution, 28 U.S.C. § 1257(a), Rule 10.1(b) of this Court, and the Court's inherent jurisdiction to grant Certiorari in all matters bearing inquiry upon a Federal Question based upon an actual case and controversy.

REASONS FOR GRANTING THE PETITION

I. FLORIDA CONSTITUTIONAL PROVISION PREVENTED THE FLORIDA SUPREME COURT FROM LOOKING TO THE RECORD OF THE PROCEEDINGS BELOW AND AFFORDING PETITIONERS FULL REVIEW AS TO THE FEDERAL BANKRUPTCY ISSUES AND WHETHER OR NOT THE DISTRICT COURT OF APPEAL SUBSTITUTED ITS VIEW OF THE EVIDENCE FOR THE TRIER OF FACT.

Article V, Section (3)(b)(3) of the Florida Constitution provides as follows:

> (b) JURISDICTION.—The supreme court:
>
> (3) May review any decision of a district court of appeal that expressly declares valid a state statute, or that expressly construes a provision of the state or federal constitution, or that expressly affects a class of constitutional or state officers, or that *expressly and directly conflicts with a decision of another district court of appeal or of the supreme court on the same question of law.* (emphasis supplied).

This provision severely limits and curtails meritorious review of opinions written by lower appellate courts, such that a party who *loses on appeal,* after winning at trial,

may not have any errors of the appellate court reviewed by the Florida Supreme Court, unless the opinion itself expressly and directly conflicts with a decision of another district court of appeal or of the Florida Supreme Court on the same question of law.

This scheme, however, disregards a compelling point that should be addressed by this Court: where a State Court Plaintiff wins at trial. and the Defendant has an absolute right to meritorious review on appeal which is *not* discretionary, *despite form or substance of the trial court's judgment,* should the Plaintiff/Appellee, consistent with Due Process and Equal Protection, be permitted an *equal* right of *mandatory* review for error in the Appellate Court? Especially where, as here, the allegation is that the appellate court has wrongfully asserted jurisdiction or wrongfully substituted its view of the evidence for that of the trier or fact but has precluded review of the Opinion by improperly using Florida's "express conflict" provision. Under Article V, Section 3(b)(3) of the Florida Constitution, the form or substance of the Appellate Opinion *dictates* whether or not meritorious review may be had in the Florida Supreme Court. Absent an opinion written "with an eye towards review", the Florida Supreme Court is *forbidden* under Article V, Section 3 (b)(3) to look to the "record proper" in order to determine either conflict, error, or wrongful conduct of the district court of appeal. This leaves open the possibility, as Petitioners contend here and contended below, for the appellate court to wrongfully or erroneously do that which it is forbidden to do, *and escape meritorious review* in the Florida State court system. In short, there is no oversight by the Florida Supreme Court of the appellate courts and their mandates, unless the appellate courts write opinions which expressly and directly conflict with decisions of other appellate courts or the Florida Supreme Court on the same questions of law.

Article V, Section 4(b)(1) of the Florida Constitution provides:

(b) JURISDICTION.—

(1) District courts of appeal shall have jurisdiction to hear appeals, that may be taken *as a matter of right* from final judgments or orders of trial courts, including those entered on review of administrative action, not directly appealable to the supreme court or a circuit court. They may review interlocutory orders in such cases to the extent provided by rules adopted by the supreme court. (emphasis supplied).

Therefore, if a trial judge substituted his view of the evidence for that of the trier of fact (e.g. the jury), that decision would be reviewable as a *matter of right*. Cf. § 59.06, *Florida Statutes* (1994). *Marcellis v. George*, 202 So.2d 107 (Fla. 4th DCA 1967). The appellate court is permitted—in fact required—to look to the "record proper" and decide the merits of all of the question presented.

In *Florida Star v. B.J.F.*, 484 U.S. 984, 98 L.Ed.2d 498, 108 S.Ct. 499 (1987) this Court certified to the Florida Supreme Court the question of whether or not the Florida Supreme Court was the final court for review of a question, or whether or not the District Court of Appeal, First District of Florida was the court of "last resort", pursuant to Article V, Section 3(b)(3) of the Florida Constitution. The Florida Supreme Court in an opinion published at *The Florida Star v. B.J.F.*, 530 So.2d 286 (Fla. 1988) answered the question stating that the Florida Supreme Court was the "court of last resort"; *however* stating that Florida's Supreme Court jurisdiction is severely limited under Article V, Section (3)(b)(3). In *B.F.J.* the Florida Supreme Court had previously denied Certiorari review of the question then presented to this Court. *The Florida Star v. B.J.F.*, 509 So.2d 1117 (Fla. 1987).

Upon certification to this Court, the Florida Supreme Court in *B.J.F.*, 530 So.2d at 288 stated:

> [T]his Court in the broadest sense has subject-matter jurisdiction under article V, section 3(b)(3) of the Florida Constitution, over any decision of a district court that expressly addresses a question of law within the four corners of the opinion itself. That is, the opinion must contain a statement or citation effectively establishing a point of law upon which the decision rests.

The *B.J.F.* Court, *id.*, in answering this Court's certified question, further responded that the discretion and the jurisdiction of the Florida Supreme Court to review is so restricted that an opinion which *conforms* to form and formal substance, though erroneous, is capable of escaping any meaningful review in that court by State Constitutional Mandate. In short, an appellate court could and in this case did, intentionally err by substituting its view of the trial evidence for that of the trial judge and jury, and in fact *intentionally ignored* the bankruptcy issues. In short, an appellate court in Florida could and in this case did, intentionally and wrongfully exert jurisdiction (ignoring the bankruptcy issues), and then erred or intentionally committed "error" by substituting its view of the trial evidence for that of the trial judge and jury.

This Court in the *B.J.F.* case noted probable jurisdiction. 488 U.S. 887, 102 L.Ed. 208, 109 S.Ct. 216 (1988). Ultimately, Article V, Section (3)(b)(3) (1980) escaped this Court's review. *B.J.F.*'s sole distinction was that the appellant both here and in the Florida Supreme Court lost at *all levels* in the state court system. The issue presented here with respect to Article V, Section (3)(b)(3) was then not ripe for review and the question was not passed upon, but rather passed over to reach the First Amendment question then presented.

The Florida Supreme Court has interpreted Article V, Section 3(b)(3) of the Florida Constitution as being one so limited in its application that it precludes virtually all review of erroneous rulings in the lower appellate courts,

except for those opinions which eke past the restrictive Constitutional Mandate.

The purpose of the implementation of this limitation is found in the committee notes to Florida Rule of Appellate Procedure 9.030(a)(2)(A)(iv), 1980 Amendment, which states:

> Subdivision (a)(2)(A)(iv) represents the most radical change in the supreme court's discretionary jurisdiction. The predecessor article V vested the supreme court with power to review district court decisions "in direct conflict with a decision of any district court of appeal or of the Supreme Court on the same point of law." These cases comprised the overwhelming bulk of the court's caseload and gave rise to an intricate body of case law interpreting the requirements for discretionary conflict review. With the enunciation of the "record proper rule" in *Foley v. Weaver Drugs, Inc.*, 177 So.2d 221 (Fla. 1965), the supreme court extended its discretionary review in instances of discernible conflict to district court decisions affirming without opinion the orders of trial courts. Amended Article V abolishes the *Foley* doctrine by requiring an "express" as well as "direct" conflict of district court decisions as a prerequisite to supreme court review. The new article also terminates supreme court jurisdiction over purely intradistrict conflicts, the resolution of which is addressed in rule 9.331.

In *Jenkins v. State*, 385 So.2d 1356 (Fla. 1980), a Per Curiam Affirmed opinion of the lower appellate court, containing a dissenting opinion, was found insufficient to sustain review. Certiorari was dismissed, but not without Justice Atkins' dissenting opinion. *Id.* at 1363. Justice Adkins outlined the quagmire in which these Petitioners are now caught. If the District Court of Appeal chose to substitute its view of the evidence for that of trier of fact, under Florida's law such action would have been impermissible. *Odoms v. Travelers Insurance Company*,

339 So.2d 196 (Fla. 1976); *Westerman v. Shell's City*, 265 So.2d 43 (Fla. 1972). However, for the Florida Supreme Court to review this error, the opinion of the appellate court must show *somewhere in its language* that the appellate court has committed this transgression, or that its opinion expressly and directly conflicts with the opinion of another district court of appeal or the Florida Supreme Court on the same issue of law.

However, once the Florida Supreme Court takes jurisdiction because of conflict on one issue, *it may decide all issues. Banker's Multiple Line Insurance Co. v. Farish*, 464 So.2d 530 (Fla. 1985) citing *Bould v. Touchette*, 349 So.2d 1181 (Fla. 1977). So, the Florida Supreme Court cannot review "the record proper" for any evidence that the District Court of Appeal substituted its view of the evidence for that of the trial judge and trier of fact, and its intentional disregard of the bankruptcy issues and the Federal bankruptcy law. Fla.R.App.P. 9.030(a)(2)(A)(iv) committee notes, supra; *Jenkins*. Therefore, absent proper form of the appellate court's opinion, the Florida Supreme Court cannot inquire into any impropriety of the appellate court's actions, no matter how egregious the error may be. However, where a trial court does so, a party who loses at trial has an *absolute* statutory and constitutional right of review to determine the same. Article V, Section 4(b)(1), Florida Constitution. *Macrellis*, supra.

In the case below, the District Court of Appeal continued to exercise jurisdiction when it was no longer permitted to do so because of the Federal bankruptcy law, and then substituted its view of the evidence for that of the trier of fact. As the losing party on appeal, Petitioners, the prevailing party at trial, *cannot* have those errors reviewed in a higher court. So there exists both a clear departure from the essential requirements of law coupled with no possibility of even discretionary review.

Justice Adkins' dissent in *Jenkins* is repeated in *Dodi Publishing Co. v. Editorial America, S.A.*, 385 So.2d 1369 (Fla. 1980); *Pena v. Tampa Federal Savings and Loan Association*, 385 So.2d 1370 (Fla. 1980); and concurred in result only as to *Stevens v. Jefferson*, 436 So.2d 33 (Fla. 1983). The few times that the Florida Supreme Court has ever departed from the strictures of Article V, Section (3)(b)(3) (1980) are *Stevens* and *Banker's Multiple Line Insurance Co. v. Farish*, 464 So.2d 530 (1985). In *Stevens* the Fifth District Court of Appeal, State of Florida, entered a "per curiam affirmed" noting "probable" conflict with another district court opinion. However, the per curiam affirmed contained no opinion other than citations of authority. Justice Boyd's dissent in *Farish* quotes *Jenkins* repeatedly. Thus, unless the appellate court "consents" to review by the Florida Supreme Court, it may rule any way it wishes without any oversight whatsoever, thus "bullet-proofing" its decisions. There is simply no accountability.

Although this Court has held in many instances that a right to appeal is not constitutionally guaranteed, where a *State* provides a first, *absolute* right of appeal, then Due Process and Equal Protection guarantees must be implemented in the appellate process. *Douglas v. California*, 372 U.S. 353, 9 L.Ed.2d 811, 83 S.Ct. 814 (1963); *Griffin v. Illinois*, 361 U.S. 12, 100 L.Ed. 891, 76 S.Ct. 585, 55 ALR2d 1055 (1956); *Evitts v. Lucey*, 469 U.S. 387, 83 L.Ed.2d 821, 105 S.Ct. 830 (1985). In the foregoing cases, this Court has found that effective assistance of counsel, rights of indigent criminal appellants to certified transcripts, and right to review on the merits were all inherently guided by Federal Constitutional principals necessitating *fair play and meritorious review.*

Florida's Constitution, Article V, Section (3)(b)(3), *as applied* and as pointed out in Justice Adkins' dissent in *Jenkins*, denies meritorious review, and prevents the Florida Supreme Court from "looking to the record

proper" or exercising oversight in any cases where a party prevails at trial, and on appeal is reversed because the losing party at trial has an absolute right of appeal. The appellate loser may then only seek review of the appellate court's errors in such limited circumstances as to prohibit introduction of the *evidence* of the error to the reviewing court. This is compounded especially where the appellate court has exercised jurisdiction where it could not, as here, in light of the bankruptcy cases, bankruptcy settlement agreement and bankruptcy court orders approving the same.

Article V, Section (3)(b)(3) (1980) of the Florida Constitution is unconstitutional *as applied*, rather than as it was intended. It provides that while a certain class of litigants have an *absolute* right of meritorious review in the appellate courts of Florida, another class of litigants *tied to the same litigation* have no right of meritorious review, where they are the winners at trial, but the losers on appeal due to appellate error, especially where there may have been no jurisdiction. This violates the Fourteenth Amendment's commands of Due Process and Equal Protection. It also invades the Sixth Amendment's command to a fair and impartial hearing, if, under the circumstances, the District Court of Appeal did improrely exercise its jurisdiction and substituted its view of the evidence for that of the trial judge and jury.

In *Mooney v. Holohan*, 294 U.S. 103, 79 L.Ed. 791, 55 S.Ct. 340, 98 ALR 406 (1935), this Court found that the knowing use of perjured testimony, and deliberate suppression of evidence constituted a denial of due process. Due process cannot be complied with where "the State has contrived a conviction through the pretense of a trial which in truth is but used as a means of depriving a defendant of liberty through deliberate deception of court and jury. . . . Such a contrivance by a State to procure the conviction . . . is inconsistent with the rudimentary demands of justice as is the obtaining of a like

result by intimidation." *Id.* at 112, 79 L.Ed 791, 55 S.Ct. 340, 98 ALR 406. Cited by Justices Stevens and Blackmun, dissenting in *Albright v. Oliver,* 510 U.S. ——, 127 L.Ed.2d 114, 140, 114 S.Ct. —— (1994). Likewise in *In re: Murchison,* 349 U.S. 133, 75 S.Ct. 623, 99 L.Ed. 942 (1945), this Court found that Due Process requires a fair hearing. Article V, Section 3(b)(3) prohibits the Florida Supreme Court from determining whether a fair hearing was afforded, whether jurisdiction was improperly exercised, or whether or not error was committed at all. Likewise it prohibited the Florida Supreme Court from considering the next issue brought here, II, below.

Petitioners submit to this Court that the state constitutional provision in issue in this case is far too narrow, thus violating due process and substantive due process.

As set forth in *Jenkins,* the purpose of the state constitutional provision was to prevent "per curiam opinions," e.g. opinions which simply affirmed or reversed, without any opinion, and perhaps citing some authority, from reaching the Florida Supreme Court for review. The constitutional provision was intended to make the District Courts of Appeal "the final court of review" as pertains to "per curiam affirmed" decisions. However, in its dragnet, the provision *as applied* actually ensnares written opinons, with citations of authority, from reaching meritorious review simply because the opinions *on their face* do not expressly and directly conflict with opinions of other district courts of appeal or the Florida Supreme Court on the same issue of law.

However, Article I, Section 21 of the Florida Constitution guarantees to each Florida Citizen, the broadest protections of law, and commands that:

> The courts shall be open to every person for redress of any injury. . . .

This broad command, coupled with the constitutional referendum put to the people as pointed out by Justice

Adkins in *Jenkins* was simply undercut. Justice Adkins aptly explained that the referendum was so broadly written, that the electorate, presumably a populace of reasonably prudent individuals of average intelligence, could not have known what it was they voted for. And indeed this was the case. Further, it was the Florida Supreme Court itself that in fact wrote the proposed amendment and the proposed referendum, not the citizens of Florida or their legislators. *Jenkins.*

The purpose of Article V, Section 3(b)(3) was to prevent abuses, and in the process it has now spawned due process abuses.

II. HAD THE FLORIDA SUPREME COURT BEEN PERMITTED TO REVIEW THE RECORD BELOW, THE FEDERAL QUESTION COULD HAVE BEEN READILY DETERMINED, AS, FLORIDA LAW FOLLOWS THE MAJORITY OF THE UNITED STATES CIRCUIT COURTS OF APPEALS WITH RESPECT TO CHOSES IN ACTION BELONGING TO A BANKRUPT'S ESTATE.

11 U.S.C. § 541(a), the United States Bankruptcy Code, provides that all property belonging to the Debtor at the time of the filing of a Chapter 7 bankruptcy proceeding, is property which belongs to the Estate and is charged to the possession and control of the Chapter 7 Trustee. Such property includes all rights legal or equitable, tangible or intangible, and *choses in action. Camp v. St. Paul Fire & Marine Ins. Co.,* 616 So.2d 12 (Fla. 1993).

The Respondent is a Chapter 7 bankrupt. At the time he filed a Notice of Appeal, October 10, 1992, he was not in bankruptcy. App. 71a-76a. However, subsequent to filing the Notice of Appeal, and before *any briefs were submitted,* Respondent filed a voluntary Chapter 7 Bankruptcy on April 1, 1993. Thus both 11 U.S.C. § 541(a) and 11 U.S.C. § 362(a) came into effect and

both stayed the appeal and also provided the Trustee an opportunity to pursue, abandon, or dismiss the appeal, or compromise the claim.

Petitioners in numerous instances sought to stay or otherwise dismiss the appeal before the District Court of Appeal on the grounds that the Respondent was violating the automatic stay and that the failure to stay those proceedings pending further orders of the Bankruptcy Court was also violative of 11 U.S.C. § 362(a). App. 43a-68a. Failure to comply with the bankruptcy law would lead to possible inconsistent results and constituted the "whipsawing" of Petitioners between various courts. The purposes of the Automatic Stay provisions of the Bankruptcy Code, and concomitant provisions of 11 U.S.C. § 541(a) are to maintain the *status quo* and preserve the rights of creditors.

Subsequent to the Petitioners' various motions to stay the appellate proceedings in the District Court of Appeal, *that court*, following a *majority of the United States Circuit Courts of Appeals*, ruled in another case, en banc, that it *was stayed* from any actions pursuant to 11 U.S.C. § 362(a), for the reasons set forth in Petitioners' arguments here and before that court. *Florida Eastern Development Company, Inc. of Hollywood v. Len-Hal Realty, Inc.*, 636 So.2d 756 (Fla. 4th DCA 1994). Subsequently, the District Court of Appeal *continued* to ignore Petitioners' pleadings and continued to consider the appeal notwithstanding the stay and the implications of 11 U.S.C. § 541(a), 11 U.S.C. § 362(a), or the *Len-Hal Realty, Inc.* decision *of that same Court*. *See* citations of authority in *Len-Hal Realty, Inc.*

That 11 U.S.C. § 541(a) and 11 U.S.C. § 362(a) control appellate proceedings in both a lower court and on appeal is axiomatic. See citations set forth in *Len-Hal Realty, Inc.* More specifically, in *In Re: Yonikus*, 996 F.2d 866 (7th Cir. 1993) the Seventh Circuit held that a worker's compensation claim and lawsuit alleging dam-

ages for the same incident are "property of the estate" which must be reported on the debtor's schedule of assets and are property of the Trustee and the estate. 11 U.S.C. § 541(a) supersedes § 70(a) of the former Bankruptcy Act. *Id.* Congress intended that all property belonging to the Estate come into the Estate, and thereafter exemptions claimed by a debtor would be determined by the bankruptcy court. Thus, Congress in effect overruled this Court's opinions in *Lockwood v. Exchange Bank,* 190 U.S. 284 (1903) and *Lines v. Frederick,* 400 U.S. 18, 27 L.Ed.2d 124, 91 S.Ct. 113 (1970). However, even in *Kokoszka v. Belford,* 417 U.S. 642, 41 L.Ed.2d 374, 94 S.Ct. 2431 (1974), this Court recognized that a right to an income tax refund was property of the Estate subject to a turnover order.

Likewise, the Eleventh Circuit in *In re: Holywell Corp.,* 913 F.2d 873 (11th Cir. 1990), held that upon filing of a bankruptcy petition, a debtor-partner's partnership interest became property of the Estate and the bankruptcy court retained jurisdiction to approve the trustee's settlement of a dispute between the debtor-partner and a non-debtor partner.

Thus, a shareholders' derivative suit for recovery of diminution in value of the debtor corporation's stock caused by the tortious acts of either an officer or director or third person belongs primarily to the debtor corporation, and therefore is within the jurisdiction of the bankruptcy court. *Griggin v. Bonapel* (In re: All American of Ashburn, Inc.), 805 F.2d 1515 (11th Cir. 1986). Choses in action that are "nonassignable" under state law are nonetheless property of the Estate. *Sierra Switchboard Co. v. Westinghouse Electric Corp.,* 789 F.2d 706 (9th Cir. 1986).

In essence every possible or even remotely contingent and litigable right constitutes property of the Estate and is subject to the jurisdiction of the bankruptcy court and belongs to the Chapter 7 Trustee—not the debtor. Like-

wise, the Respondent had no authority to prosecute his appeal after filing bankruptcy in Chapter 7, without proper authority from the bankruptcy court and the Trustee. Since no such authority was ever properly set forth, the District Court of Appeal improperly considered the proceedings even though Respondent had *absolutely no standing to prosecute his appeal,* and the District Court of Appeal had no jurisdiction to further entertain it without proper authority from the Bankruptcy Court.

As the Eleventh Circuit Court of Appeal noted in *Jones v. Harrell,* 858 F.2d 667 (11th Cir. 1988), the authority to settle and likewise prosecute a claim belongs to the Trustee and the Estate post-petition, *not the debtor.* See *Harrell* at 669-70. There was no reason why the Petitioners should have been denied the benefit of dealing with the Bankruptcy Trustee, the Respondent's Estate and the Bankruptcy Court, by the State Court.

Respondent sought no action in the Bankruptcy Court with respect to his prosecution of the appeals. His Trustee neither abandoned, nor did Respondent seek to compel his Trustee to abandon or prosecute his appeal. In fact, Mr. Broxmeyer's bankruptcy Trustee was not even subjected to a motion to either abandon or prosecute the same. Ultimately, Mr. Broxmeyer conceded liability, by *voluntarily* defaulting on an adversary proceeding objecting to discharge, after being represented by counsel. The default established the allegations of the adversary complaint, one of which was the continued prosecution of the appeal without authority or stay relief. App. 77a-93a (excludes exhibits to the complaint which are irrelevant here). See especially, however, App. 86a (Count VI of the adversary complaint).

Since the reversal of the original judgment, Respondent Marvin Broxmeyer has sought "restitution" from the Petitioners. The State trial court has entered such an order. App. 94a-99a.

It is axiomatic that the Due Process Clause supersedes the jurisdiction of any State and its sovereign courts. Amendment XIV of the United States Constitution binds all States to its commands. Further, with respect to Bankruptcy law, Article I, Section 8, Cl. 4 of the United States Constitution commands that Congress shall legislate in the area of Bankruptcies, and Article VI, Cl. 2 of the United States Constitution provides that all laws in pursuance of the United States Constitution shall be supreme and the Judges in every state are bound thereby.

As this Court aptly pointed out in *Sperry v. Florida,* 373 U.S. 379, 10 L.Ed.2d 428, 83 S.Ct. 1322 (1963), in a case on this point, The Florida Bar was found to have no jurisdiction to attempt to regulate the practice of patent law before the U.S. Patent Office or its Commissioner. The Supremacy Clause of the United States Constitution was therefore reaffirmed. In *Florida v. Meyers,* 466 U.S. 380, 80 L.Ed.2d 381, 104 S.Ct. 1852 (1984), the Florida Supreme Court denied review, though a Federal question was presented. In absence of meaningful review, this Court took jurisdiction and reversed the Fourth District Court of Appeal. It was pointed out in the dissent (Stevens, J. with Brennan and Marshall, JJ. concur dissenting) that the Florida Supreme Court merely denied certiorari without any reason. Unlike *Meyers,* in this case, review was denied specifically because of Article V, Section 3(b)(3) of the Florida Constitution, and so jurisdiction on both the Federal question and ultimately the Constitutional questions are ripe for review.

The prosecution of the appeals to the District Court of Appeal was without any authority by Respondent. This issue could not be reached by the Florida Supreme Court as Article V, Section 3(b)(3) of the Florida Constitution provides that the Florida Supreme Court cannot determine the rulings of the Appellate Court unless the lower decision expressly and directly conflicts with the other district courts of appeal or the Florida Supreme Court on

the same question of law. Since the opinion of the District Court of Appeal contained no reference to the bankruptcy matters, the Florida Supreme Court found that it had no jurisdiction to review the Fourth District Court of Appeal's rulings.

CONCLUSION

For the foregoing reasons, Appellants/Petitioners respectfully request this Court to grant their petition for a writ of certiorari to review the decision of the Florida Supreme Court, and sub nom. the District Court of Appeal, Fourth District of Florida.

Respectfully submitted,

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